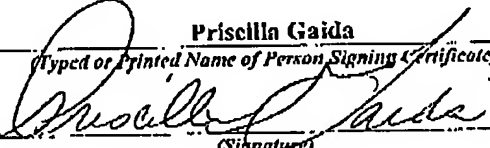


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CERTIFICATE OF TRANSMISSION BY FACSIMILE (37 CFR 1.8)			Docket No. ROBI-4162
Applicant(s): Russell Warner			
Application No. 10/728,375	Filing Date 12/03/2003	Examiner Barrett, Suzanne	Group Art Unit 3676
Invention: FROZEN DOOR OPENER			
<p>I hereby certify that this <u>Reply Brief (11 pgs.)</u> <small>(Identify type of correspondence)</small> is being facsimile transmitted to the United States Patent and Trademark Office (Fax. No. <u>(571) 273-8300</u>) on <u>November 21, 2005</u> <small>(Date)</small></p> <p style="text-align: right;"><u>Priscilla Gaida</u> <small>(Typed or Printed Name of Person Signing Certificate)</small>  <small>(Signature)</small></p> <p style="text-align: center;">Note: Each paper must have its own certificate of mailing.</p>			

P10/REV02

ATTORNEY DOCKET NO. Robi-4162

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appellant: Russell Warner

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Examiner: Suzanne L. Dino Barrett

Serial No.: 10/728,375

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Art Unit: 3676

Filed: December 3, 2003

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For: FROZEN DOOR OPENER

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Commissioner For Patents
Alexandria, VA 22313

Reply Brief

BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

This reply brief is being filed in response to the Examiner's Response to the previously filed Appeal Brief of May 19, 2005, the Examiner's Response being filed on August 22, 2005.

Status of claims

Claims 1-8, 12, 14 and 15 are currently pending. Claims 9, 10, 11 and 13 are cancelled.

Claims 1-8, 12, 14 and 15 are on Appeal.

Grounds of Rejection to be Reviewed on Appeal

I) Claims 1-8, 12, 14 and 15 stand rejected under 35 USC 103(a) over Sutton, US patent 4,788,893 and Thomas et al., US patent 5,337,632.¹

II) Claim 9 stands rejected under 35 USC 103(a) over Sutton, US patent 4,788,893 and Thomas et al., US patent 5,337,632, as applied to claim 1 and further in view of Crowley, US patent 6,799,491 or Moscs D164,705 or Waddell D442,840. It should be noted claim 9 was cancelled in the final amendment submitted on December 15, 2004, and the feature thereof incorporated into revised claim 1. Accordingly, the Appellant will address the Examiner's comments with respect to claim 9 as if they were directed instead to revised claim 1.

¹ Claim 15 is not currently included in any substantive rejection, but is cited on the PTOJ, form 326 as being rejected.

Response to Examiner's Argument

D) Claims 1-8, 12, 14 and 15 stand rejected under 35 USC 103(a) over Sutton, US patent 4,788,893 and Thomas et al., US patent 5,337,632.

The Appellant has previously contended that the examiner committed error in arriving at a *prima facie* case of obviousness in rejecting claims 1-8, 12, 14 and 15 because the combination does not disclose each and every feature of the claimed invention. In particular the examiner has not met the burden of showing, *inter alia*, the following claimed feature:

first 2 and second plate 3 portions (page 7, last paragraph) of substantially equal length and each having an upper and lower surface and a width which is constant along an entire length of the first and second plate portions (emphasis added).

With reference to Figure 1 of Sutton, it can be seen that the width of the device disclosed therein narrows towards the upper end of the body where the key ring aperture is located. However, the present invention, as defined in the amended claims submitted on September 8, 2004, comprises first and second plate portions having a width which is constant along an entire length of the first and the second plate portions, including the upper end where the key ring aperture is located. By virtue of the present invention having a constant width at the upper end where the key chain is located (and where the user grasps the device), the device has a greater surface area at this point in which a user can use to effect body leverage unto the device to break the frozen seal and assist in prying open the door.

The Examiner agrees, on page 4 (on lines 9 and 10) of the Examiner's Answer to the Appeal Brief, that Thomas *et al* does not teach two angled portions of substantially equal length, but further

notes that Thomas *et al* is only applied against the claims as a modifying reference, in combination with Sutton, to teach a constant width along the length of the opener. This position, in fact, is not persuasive, since it is the Appellant's position that neither of these references, and particularly Thomas *et al*, teach a constant width along the length of the opener. It can be plainly seen with reference to Figure 1 of Sutton that the width of the device disclosed therein narrows towards the upper end of the body where the key ring aperture is located. This can also be seen with reference to Figures 1 and 3 of Thomas *et al*, wherein it can likewise be clearly seen that the width of the device disclosed therein tapers and narrows significantly at the upper end of the body (element "26" of Thomas *et al*) where the key ring aperture is located. In fact, the description of Thomas *et al* itself clearly notes this element "26" on column 2, at line 57, as being a "*curved tail end*". Accordingly, the Appellant again reiterates his position that neither of these references teach a constant width along the entire length of the opener.

The Appellant has also previously contended that the device disclosed in Sutton would be ill-suited for opening frozen doors, in the manner as indicated by the present invention, as the plastic construction may break as the user attempts to lever the door open. The Examiner's contention, on page 4 (on lines 1 and 2) of the Examiner's Answer to the Appeal Brief, is that this argument is not persuasive, since the Appellant's claim 8 defines the opener of the claimed invention as being constructed of plastic. The Examiner is overlooking the fact that claim 8 also defines that the opener of the claimed invention may also be made of metal, fiberglass or aluminum. Furthermore, the present invention, as defined in the amended claims submitted on September 8, 2004, comprises first and second plate portions which are compact, and of substantially equal length, which reduces the likelihood of the first or second plate portions breaking or separating from each other during use,

as can be noted with reference to the description on page 8 at lines 2 to 8. In fact, it is possible that a resilient, sturdy plastic could be successfully utilized in constructing the opener disclosed in the present invention because the first and second plate portions are compact, and of substantially equal length, which reduces the likelihood of breakage in use. Anyone who has tried to break a very small stick in two can attest to the relative difficulty in breaking such a compact structure.

United States Patent No. 4,788,893 (Sutton), by contrast, is directed to opening door handles (with a view to avoiding broken nails and such). More specifically, in operation the device disclosed in Sutton is meant to be placed under a door handle and then lifted upwardly so as to assist in opening the door handle. Accordingly, the Appellant is of the view that Sutton is not of a similar nature to that of the present invention, as the device described therein is designed as a "hook" of plastic construction (see column 2, lines 1 and 19 of Sutton) which is to replace one's fingertips as the operative force in opening an automobile door. It also does not have first and second plate portions which are compact, and of substantially equal length. Due to this imbalance between the lengths of the first and second plate portions in the device disclosed in Sutton, with one of these having an elongated length much greater than that of the other, the likelihood of breakage is much greater. In essence, the Appellant again reiterates that the device disclosed in Sutton would be ill-suited for opening frozen doors, in the manner as indicated by the present invention, as the plastic construction may break as the user attempts to lever the door open.

The second error committed by the Examiner in arriving at a *prima facie* case of obviousness in rejecting claims 1-8, 12, 14 and 15 is that the primary reference to Sutton teaches away from the

claimed invention. In particular the Examiner has not met the burden of obviating, *inter alia*, the following claimed feature:

a device having a first plate portion in spaced relation to the second plate portion to form a substantially right angle about a central point of from 60 degrees to 85 degrees. (emphasis added).

Sutton clearly indicates, on column 2 at line 55, that the hinge is limited to opening to "approximately 45 degrees". Appellant notes that, for the purpose envisioned by the device disclosed in Sutton, this is adequate, because the device described in Sutton is not meant to be biased between the car door frame and the door to lever a frozen door open, as is the case with the present invention, but rather it is merely to grasp the underside of a door handle and be lifted upwardly to manipulate the door handle in opening the door. By contrast, the present invention, as defined in the amended claims submitted on December 15, 2004, is directed to a device having a first plate portion in spaced relation to the second plate portion to form a substantially right angle about a central point of from 60 degrees to 85 degrees. By virtue of this manner of construction, when the user inserts the first plate portion for placement in a frame opening between the door frame and the door, and the second plate portion is then pushed in a first direction by the user towards an upper surface of the door frame, the upper surface of the first plate portion engages a lip of the door and, as a result of the angled relationship between the first and second plate portions, the device pivots about the central point, whereby an outer edge of the central point biases within the frame opening, allowing the user to apply moderate leverage to the device and effect the first plate portion to pivot upwardly, about the central point, from the placement between the door frame and the door, and force the car door away from an adjacent relationship with the door frame so as to separate and break the frozen

or stiff seal formed between the door and the door frame. This is completely absent from the device described in Sutton.

It is noted that the Examiner contends, on page 4 (on lines 20 and 21) of the Examiner's Answer to the Appeal Brief, that while the specification of Sutton sets forth a range of "approximately 45 degrees", Figure 2 of Sutton seems to disclose an angle of 65 degrees, and thus is commensurate with the specification of Sutton's disclosure of "approximately 45 degrees", and thus does not teach away from the present invention. The Appellant reiterates that Sutton's description clearly indicates, on column 2 at lines 54-56, that, "...the four bumps 12 on hinge 10 function to LIMIT the opening of the hinge 10 to approximately 45 degrees" (emphasis supplied). The Appellant contends that the Examiner's position could be accepted if it was to encompass the opening of the hinge being of a slight deviation from that disclosed in Sutton (ie: "approximately 45 degrees"). For example, approximately, 40 degrees or 50 degrees. The term "approximately" cannot be construed, however, as being expandable to encompass a significant angulature difference as that contemplated in the present invention, of from 60 degrees to 85 degrees, because the wording of the Sutton description clearly qualifies that the opening of the hinge 10 to is to be LIMITED to approximately 45 degrees (emphasis supplied). The presence of the terms LIMITED TO in the Sutton description necessarily can be argued to restrict the word "approximately" to encompass only minor deviations from the 45 degree angulature set forth in the Sutton description.

Furthermore, and as set out in the Appellant's previously filed Appeal Brief, a further error below is that the Examiner relied upon the teaching of the drawing (Figure 2) in Sutton to expand the description of Sutton to include the claimed range of 60 degrees to 85 degrees, when the drawing disagrees with the specification, as noted above. MPEP § 2125 is clear on the Office's position with
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respect to such an argument. It should be noted that a Request for Reconsideration was filed on January 18, 2005 in response to the Advisory Action of December 27, 2004. In the Advisory, the Examiner contended that Figure 2 of Sutton seems to illustrate a door handle opener having an angle of 65 degrees between the two portions. In a request for reconsideration, Appellant argued that the provisions of MPEP § 2125 and the decision in *In re Wright*, 569 F.2d 1124, 193 USPQ 332 (CCPA 1977) do not allow for such a disagreement. Thus, the rejection is improper.

The Examiner further rejects the claimed range of 60 degrees to 85 degrees by relying on a combination of Sutton, US patent 4,788,893, Thomas et al., US patent 5,337,632, as applied to claim 1 and further in view of Crowley, US patent 6,799,491 or Moses D164,705 or Waddell D442,840.

The Appellant has already refuted the applicability of Sutton above, and, in the response to the Final Office Action of November 18, 2004 (filed on December 15, 2004), the Appellant further refuted the applicability of United States Patent No. 5,337,632 (Thomas *et al*) by noting that Thomas *et al* clearly indicates, on column 3 at line 55, that the hook is "curved away from the handle portion at approximately 180 degrees", and, as such, could not be considered as being of a similar nature to the present invention. Clearly, Thomas does not supply the defect of the claimed range as taught by Sutton.

It should be noted that the Examiner, in rejecting claim 1, further utilizes United States Patent No. 6,799,491 (Crowley) and United States Design Patents Nos. D164,705 (Moses) and D442,840 (Waddell) to obviate the claimed range of 60 to 85 degrees. The Examiner alleges that the devices

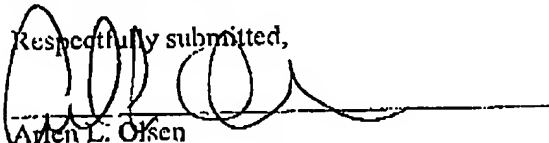
disclosed in United States Design Patents Nos. D164,705 (Moses) and D442,840 (Waddell) are all examples of cumbersome, elongated pry tools having an angle between the handle and pry portion in the range of 45-85 degrees, and, in combination with Sutton, render the present application unpatentable. However, the Examiner has failed to provide any motivation why one of ordinary skill in the art, in assessing such a key chain type of opener, would be led to such references when the primary reference teaches away from the combination. The examiner contends, on page 5 (on lines 14 to 17) of the Examiner's Answer to the Appeal Brief, that pry tools such as these are pertinent to the present invention. The Appellant maintains that these references are elongated, pry tools which would be quite cumbersome if they were to be placed upon a key chain, as is the case with the present invention. Thus, they cannot be considered to have the same portability and ease of use as that of the present invention. Most importantly, they also do not disclose each and every feature of the claimed invention, which is specifically first and second plate portions having a width which is constant along an entire length of the first and the second plate portions. As such, United States Patent No. 6,799,491 (Crowley) and United States Design Patents Nos. D164,705 (Moses) and D442,840 (Waddell) cannot be considered as being of a similar nature to the present invention. Thus, the rejection is improper.

The Director is hereby authorized to charge and/or credit Deposit Account No. 19-0513.

Respectfully, Appellant requests the board reverse the Examiner's decision below.

Date: 11-21-2005

Respectfully submitted,


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